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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~Nos. 1832, 1852, 1853, 1854, 1862~~

70-287, 70-307, 70-308, 70-317

ROBERT E. JACKS,
Petitioner in No. 1832,

BECHTEL CORPORATION,
Petitioner in No. 1852,

KARL T. FELDMAN,
Petitioner in No. 1853,

COLONIAL PIPELINE COMPANY,
Petitioner in No. 1854,

BEN D. LEUTY,
Petitioner in No. 1862,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petitions for Certiorari to the Superior Court of New Jersey, Middlesex County

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondent, State of New Jersey, respectfully prays that writs of certiorari sought in the above-captioned pe-

titions to review the interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, entered December 8, 1969 denying motions of all petitioners to dismiss pending indictments, be denied. Inasmuch as these cases arise out of a single series of transactions and largely involve identical issues of law, this brief is offered as a consolidated response to all pending petitions.

Counter-Statement of Jurisdiction

Respondent denies that this Court possesses jurisdiction under 28 U.S.C. §1257 (3) to consider the above-named matter on petition for certiorari.

The theory upon which all petitioners assert the jurisdiction of this Court, when applied to the facts of the instant cases, does not project the requisite "final order or decree" upon which such jurisdiction must be founded. In essence, petitioners say that if this Court ultimately finds that *Bartkus* v. *Illinois,* 359 U. S. 121 (1959), should be overruled, leaving aside the facts of these cases, jurisdiction is properly asserted, and a substantial federal question is thereby presented. But they do not cite a another instance where this Court has considered an interlocutory order of a state court as final for purposes of jurisdiction through a similar exercise in prospective overruling. *Cf. Carroll* v. *United States,* 354 U. S. 394, 403-405 (1957).

The more fundamental infirmity of the instant petitions is their common assumption that respondent's ability to try them on the pending state indictments is pivoted exclusively on the vitality of the *Bartkus* doctrine. It is demonstrated below that this notion must fall of its own weight, and with it any basis for present jurisdiction.

Moreover, before the dual sovereignty question can even be brought into focus, the trial court must have an adequate opportunity to develop the factual issues in these cases in light of the collateral estoppel principles articulated in *Ashe* v. *Swenson,* 397 U. S. 436 (1970). An application of those principles and stipulations of facts by the parties may make it evident that in trying petitioner, *Bartkus* need not be invoked at all to avoid collision with the general principles of double jeopardy, even upon counts which appear to parallel those upon which petitioners were acquitted in the federal courts.

In trying petitioners Jacks, Leuty and Feldman the trial court must focus upon the same facts embraced in the two all-encompassing conspiracy counts upon which they were initially convicted, but have hitherto escaped punishment.

Thus, even assuming *Bartkus* were no longer the law at this moment, and trial on the similar counts would be technically improper under the principles of collateral estoppel, trying petitioners upon such additional counts would itself involve no greater burden, anxiety or expense than trial limited to the all-embracing conspiracy charges; nor could it by itself constitute irreparable jury. *Younger* v. *Harris,* —— U. S. ——, 91 S. Ct. 746, 751 (1971). Even accepting petitioners' premise that *Bartkus* has been emasculated, trial on the added counts would amount to harmless error.

Likewise, given the present posture of these cases and the facts that *Bartkus* is the law at this moment, the dual sovereignty question will only become substantial and ripe for the Court's decision when it is presented in terms of respondent's ability to impose a punishment after the courts of New Jersey have passed upon it on

a full record. In every case which has served as a vehicle for re-examination of the double jeopardy clause in a state or inter-jurisdictional context, this Court has only considered such questions in terms of the possibility of punishment; e.g., *Bartkus* v. *Illinois, supra; Abbate* v. *United States,* 359 U. S. 187 (1959); *Benton* v. *Maryland,* 395 U. S. 784 (1969); *Ashe* v. *Swenson, supra.* On the other hand a procedure which allowed interlocutory assaults on governing precedents would be antiethical to any notion of comity and a grave hindrance to the administration of justice.

Hence, review at this juncture would be premature since the *Bartkus* question, which has real significance only in terms of punishment on the substantive counts must remain hypothetical until the possibility of such punishment becomes imminent.

Counter-Statement of Questions Presented

1. Are corporations within the protection of the Fifth Amendment guarantee that: "no person . . . shall be subject, for the same offense, to be twice put in jeopardy of life and limb . . ."?

2. May a state try a defendant under a valid state indictment after defendant's convictions on similar federal charges has been set aside at the instance of defendant without a showing of prejudice to defendant, upon a finding that the grand jury which returned the federal indictments was improperly selected?

3. Is a prosecution under N.J.S.A. 2A:93-6 (following an acquittal upon federal charges alleging violation of 18 U.S.C. §1952 based on an "intent" to facilitate or promote the violation of N.J.S.A. 2A:93-6 through interstate

means) barred under the principles of collateral estoppel lately set down in *Ashe* v. *Swenson, supra?*

4. Assuming the right of a state to try a defendant on several counts of an indictment including the all-embracing conspiracy counts is not dependent on the doctrine of dual sovereignty, should this Court before trial grant review to determine whether *Bartkus* v. *Illinois,* should be overruled in order to avoid the possibility that ultimately the right of the state to punish defendant upon a conviction on other counts might depend on the fact of the state's separate sovereignty?

Counter-Statement of the Case

From early in 1963 and through the end of 1964, petitioner, Colonial Pipeline Co. ("Colonial") a corporation of which petitioner Leuty was president, and petitioner Feldman was vice president, engaged in the construction of an interstate pipeline system terminating in New Jersey. Petitioner Bechtel Corporation ("Bechtel") was under contract with Colonial to perform some of the engineering and construction work on the project. Colonial's wished to establish a terminal facility for the system in Woodbridge, New Jersey, within the Port Reading section of the third ward in that township. During 1963, the third ward was represented on the Woodbridge township committee by petitioner Robert E. Jacks. On January 1, 1964, Jacks assumed the position of president and voting member of the Municipal Council of Woodbridge. Walter Zirpolo, at all times relevant to these cases served as mayor of Woodbridge and as a voting member of its planning board.

The terminal facility envisioned by Colonial involved the construction of 22 petroleum storage tanks for which

a building permit was required. Apparently, Colonial was aware of stiff opposition among the residents of the third ward to the project. Realizing that legitimate channels might be unavailing, Colonial solicited the assistance of Mayor Zirpolo in securing the permit. In order to complete the system, Colonial also was required to obtain easements from the City of Woodbridge to permit it to run the pipeline through township property to the projected terminal point. Colonial also sought Zirpolo's assistance in promoting the sale of the easements from the township to Colonial.

However, Zirpolo was not able to offer immediate assistance. An election was imminent (on November 3, 1963) and Zirpolo was a candidate for re-election. His associate Jacks was running for the council post. They both had promised their constituents that no new tanks would be built in the Port Reading area. Consequently Zirpolo informed Colonial that it would be more feasible politically to defer formal action on the permit and easements until after the election. In the interim the details of the plan were worked out between a representative of Colonial and Jacks acting on behalf of himself and Zirpolo.

Eventually the officers of Colonial including Leuty and Feldman accepted the plan as proposed by Zirpolo and Jacks. Two separate conspiracies were developed. The conspiracy to obtain the building permit assumed the following configuration: Colonial's officers agreed to a bribe of $50,000.00 to Zirpolo and Jacks in the guise of a campaign contribution to assure their assistance in the matter. The money was to come from Colonial's Atlanta office and be delivered in separate installments of $20,000.00, $15,000.00 and $15,000.00. Colonial officers, most

prominently Leuty and Feldman, enlisted the aid of one of their sub-contractors to transmit the payments to Zirpolo and Jacks in New Jersey. The first payment was to be made on the day following the election; the second payment was to be due at the time of the issuance of the building permit and the final payment was to be made after the certificate of occupancy had been issued to Colonial by the township. Respondent will seek to prove on trial that all of this came to pass.

Beginning in January of 1964, a second conspiracy was developed among Colonial's officers and Zirpolo and Jacks to obtain the desired easement. For their assistance in this matter, Zirpolo and Jacks were to receive the amount of $10,000.00 from Colonial. Leuty and Feldman and other Colonial officers in working out the details of this scheme and its eventual execution. This plan also came to fruition as will be proven at trial.

In February 1967, all of the petitioners, as well as several others, were indicted by a federal grand jury for various substantive violations of 18 U.S.C. §1952 and conspiracy to violate that act based on the foregoing transactions. The federal indictment charged all of the petitioners with the exception of Bechtel in seven substantive counts, alleging separate acts of unlawfully employing the facilities of interstate commerce to ". . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of . . . [and] unlawful activity . . . [i.e.] extortion; . . . [or] bribery in violation of the laws of the state in which committed or of the United States . . ." It is recited therein that the alleged wrongful use of interstate means was intended to facilitate the violation of N.J.S.A. 2A:93-6, a bribery statute, and other bribery laws, although the federal indictments do not charge that such New Jersey laws were thereby violated.

Also included in the federal indictments were two conspiracy counts relating first to the scheme developed to obtain the building permit and second, to the plan to procure the sale of the easements. Bechtel, unlike the other petitioners, was only charged with participating in the second conspiracy and in conduct designed to affect a payment to Jacks and Zirpolo in New Jersey, pursuant to that scheme.

On January 3, 1969, verdicts were returned on the federal indictments against all petitioners. Petitioner Colonial was found guilty on all counts and fined a total of $90,000.00; petitioners Leuty and Feldman were found guilty only on the two conspiracy counts; petitioner Bechtel was found guilty on both of the counts on which it had been indicted; petitioner Jacks was found guilty on both conspiracy counts and one substantive count.

The United States Court of Appeals for the Third Circuit set aside petitioners federal convictions on the ground that the method used in the district of New Jersey to impanel the grand jury which returned the federal indictments departed from the pertinent statutory standard and resulted in a systematic under-representation of women. However, in setting aside the convictions the court noted that there was no proof of prejudice to petitioners resulting from this improper practice. *United States* v. *Zirpolo, et al.*, —— F. 2d ——, Crim. Nos. 18,-137-18,142, 3 Cir., Feb. 18, 1971 (Slip opinion, at 7-8). The Third Circuit on July 1, 1971, denied the petition of the United States for re-hearing *en banc* in these cases and the government has been required to reindict petitioners.

After the return of the federal indictments, the Middlesex County grand jury returned a series of indictments against petitioners relating to state violations arising out

of the same transactions which formed the basis of the federal indictments. Most of these charges allege violations of N.J.S.A. 2A:93-6, the bribery statute, whose violation was recited to be the intended object of the proscribed activity forming the basis of the federal indictments. Petitioners were also charged in various counts with aiding and abetting violations of N.J.S.A. 2A:93-6, as well as with two separate counts of conspiracy to violate this provision. Separate indictments were also returned against Jacks and Zirpolo, charging them with two conspiratorial and five substantive violations of N.J.S.A. 2A:105-1 which prohibits unlawful takings by public officers under color of office. A third state indictment was returned charging Jacks alone with five counts of common law misconduct in office in violation of N.J.S.A. 2A:85-1.

Petitioners applied before Mr. Justice Brennan for stay of the state proceedings pending the filing of petition for certiorari in this Court. After full review of petitioners' applications supported by briefs, which set forth the same arguments made in the pending petitions, as well as respondent's memorandum in opposition to the application, Mr. Justice Brennan denied such applications on April 23, 1971.

Reasons for Denying the Writ

Petitioners have portrayed all the pending cases as frontal assaults on the doctrine of *Bartkus* v. *Illinois*, 358 U. S. 121 (1959). Respondent will demonstrate that at best the *Bartkus* question is tangential in every one of these cases in their present postures and clearly insubstantial. In every case the threshhold question is respondent's ability to *try* the particular petitioner involved on

some basis and such ability does not rest on *Bartkus*. Respondent contends that at this juncture the Court is without jurisdiction in the pending cases, irrespective of whether at some later time respondent's ability to punish petitioners for some of the offenses alleged may depend upon the survival of the dual sovereignty concept. It at a later point in the proceedings, this question rises above a hypothetical concern and is decided adversely to petitioners by the courts of New Jersey, it might then and only then become ripe for review by this Court.

In support of respondent's contention that its present right to *try* petitioners is beyond challenge, it will demonstrate that: (a) the double jeopardy clause of the Fifth Amendment protects only natural persons and may not be availed of by the corporate petitioners, Bechtel and Colonial; (b) the statutes under which respondent seeks to try petitioners are conceptually distinct from 18 U.S.C. §1952 and require the proof of wholly different acts in order to establish the violations in question; (c) trial of petitioners upon separate state indictments, following the setting aside upon motions of petitioners of their convictions on similar federal charges on the ground that the underlying federal indictments were technically defective is entirely consistent with the federal standards set forth in *Ewell* v. *U. S.*, 383 U. S. 116, (1966) and applied to the states under *Benton* v. *Maryland, supra,* and any erosion of the dual sovereignty concept must serve to reinforce this conclusion; (d) trial of all petitioners, particularly petitioner Jacks, who acknowledges that the federal substantive charges against him failed only because there was no proof of interstate activity on his part, is fully consistent with the collateral estoppel doctrine of *Ashe* v. *Swenson, supra,* even under the principles urged on this Court by Justice Brennan, *Id.*, 397 U. S., at 53, n.7.

POINT I

Respondent seeks to prosecute petitioners for violations of statutes that are conceptually distinct, and require different proofs from the violations under 18 U.S.C. §1952 for which they were tried.

Petitioners state that respondent is seeking to prosecute them a second time for violations of the same statute for which they have already been tried in the federal courts. Such representations are plainly inaccurate as a glance at the federal indictments reveals. (See Petitioner Leuty's Appendix "D").

The federal government attempted to prosecute petitioners for violating U.S.C. §1952. Like penal provisions generally, a violation of this statute is founded upon the merger of certain conduct with a certain intent. The conduct in question is described as ". . . [travelling] in interstate or foreign commerce or . . . [use of] any facility in interstate or foreign commerce. . . ." 18 U.S.C. §1952.

However, such acts are only punishable under 18 U.S.C. §1952 if they are undertaken with the "intent" to (inter alia):

> ". . . (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, or carrying on of any unlawful activity."

The "unlawful" "activity" that is the object of the accompanying intent may take one of several forms, to wit:

> (1) ". . . [a] business enterprise involving gambling, liquor on which the federal exise tax has

> not been paid, narcotics, or prostitution offenses in violation of the laws of the state in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which they are committed . . . or [extortion, bribery, or arson in violation of the laws] of the United States." 18 U.S.C. §1952(b)

The configuration of this statute is reminiscent of the common law crime of burglary which is also a product of the merger of a species of often-innocuous conduct with an intent to commit certain types of illegal acts. (i.e., felonies). The crime of burglary is, of course, conceptually distinct from whatever felony might ensue. The burglary and the felony remain separately punishable though they share and require proof of but a single intent.

To similar effect, it is obvious that Congress in passing 18 U.S.C. §1952 did not thereby intend to have that statute supplant every existing federal gambling, liquor, narcotics, prostitution, extortion, bribery, or arson statute then in force. But in the final analysis the petitioners' contentions reduce to an assertion that in enacting the Travel Act; 18 U.S.C. §1952, Congress vested the federal courts with pre-emptive jurisdiction in any case where the alleged violation of a state statute of the classes enumerated in 18 U.S.C. §1952 is touched by interstate activity. It should be self-evident that Congress did not intend this result, particularly where violation of a state rather than a federal law is concerned. To suppose otherwise would be at odds with the whole philosophy of federalism that undergirds our system of government.

Moreover, petitioners' notion is strongly belied by observations of this Court in *United States* v. *Nardello*, 393 U. S. 286 (1969). In *Nardello*, this Court found the purpose of the Travel Act was to supplement, not supplant the machinery available to local officials in combating crime. *Id.* 393 U. S. at 290. The Act was designed only as a means of reaching into those areas of wrongful conduct which could not be dealt with under state law. Its purpose, as illuminated in *Nardello*, was to close gaps that existed in both federal and State law enforcement schemes rather than as petitioners contend, to "backstop" or, more accurately, pre-empt local law enforcement. Petitioners do not point to a single case where prosecution under 18 U.S.C. §1952 has been held to bar simultaneous prosecution and conviction under the same federal indictment for commission of the substantive federal crime that the proscribed interstate activity was intended to promote or facilitate. *Cf. Gore* v. *United States*, 357 U. S. 386 (1958), *reh. den.* 358 U. S. 858. To suppose otherwise would do obvious violence to the clear intent of Congress.

While the violations charged in the various state indictments in the instant cases by-and-large charge the same intent (*mens re*) as the violations charged in the federal indictments, the acts proscribed thereunder are wholly distinct and separate from the acts which form the basis for the violations of 18 U.S.C. §1952 charged under the federal indictments. Just as in a prosecution for common law burglary, it is possible for one to commit burglary with the requisite felonious intent without being chargeable for the intended felony or, on the other hand, to be chargeable with the intended felony in a situation where the elements of common law burglary are not present (e.g., where the entry takes place in the day-

time), the federal law may be violated without the occurrence of a state violation, or vice versa. Of course, with regard to the violations of N.J.S.A. 2A:85-1 and N.J.S.A. 2A:105-1 for which the defendant Jacks was separately indicted, the requisite intent is not shared by the state violations charged and the federal violations for which Jacks was prosecuted.

In any event it is plain that the federal prosecution of these petitioners could implicate no more than the intent element of the violations of N.J.S.A. 2A:93-6 charged under the state indictments. Thus, as petitioner Leuty acknowledged in the lower court, even if the double jeopardy guarantee is to be applied in these cases, it must be applied in the form of collateral estoppel, not actual *res judicata.*

Ashe v. *Swenson, supra,* is a controlling authority in this area. The Court in *Ashe* stated the principles of collateral estoppel to be: ". . . simply that when an issue of ultimate facts has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any further law suit." *Id.* 397 U. S., at 443. Assuming, for argument's sake, that separate sovereignty is to have no force and federal and state governments must therefore be treated as the same party for purposes of collateral estoppel it still remains apparent in all these cases that: ". . . a rational jury [in the federal case] could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* 397 U. S., at 444 (footnote omitted). Indeed, petitioner Jacks candidly admits that he avoided conviction on several substantive charges only because of a lack of evidence concerning his involvement with interstate activities. The corporate petitioners, of course, were found guilty on all counts so that there

is no basis for contending that the State seeks reconsideration of any issue of ultimate fact with regard to either of them.

Petitioner Leuty however contends that although his acquittal on the substantive charges of the federal indictment was based upon a general verdict, the only factual question regarding his guilt in dispute there was that of *intent* to commit bribery. This contention is strongly belied by the federal jury's determination of guilt on the conspiracy counts which required the identical determination of intent. In any event, only the trial court would be in a position to make the pragmatic inquiry directed by *Ashe* as to the "sameness" of the evidence to be presented in the state prosecution.

It is interesting to note that even if this Court were to adopt the "same transaction test" urged by Mr. Justice Brennan in *Ashe* v. *Swenson, supra,* 397 U. S. at 448 *et seq.,* collateral estoppel would not bar the State prosecution. The federal courts have not tried these petitioners for violation of N.J.S.A. 2A:93-6. They lack jurisdiction to do so. Neither the federal court nor the state court has jurisdiction to try petitioners for all of the violations arising out of the transactions in question. As Mr. Justice Brennan noted, even the expansive view of the double jeopardy clause he would have adopted could not bar a second prosecution where no single court had jurisdiction of all the alleged crimes arising out of a single transaction. *Id.* 397 U. S., at 453, n. 7.

Thus, respondents submit that even if the dual sovereignty doctrine of *Bartkus* no longer held any force, prosecution of these defendants would be entirely compatable with the principles of double jeopardy relevant to these cases.

POINT II

Petitioners, Colonial and Bechtel are not protected by the Double Jeopardy Clause of the Fifth Amendment.

Two of the petitioners in these cases are multi-million dollar corporations. They have no standing to invoke the protection of the Double Jeopardy Clause of the Fifth Amendment which provides that:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

Plainly, a corporation, which is without "life or limb" was not intended to be protected by this provision. Even Mr. Justice Black on behalf of the dissenters in *Bartkus, supra,* made clear throughout his opinion that his conception of the protection afforded by the guarantee extended only to natural persons. (E.g., "people", *id.* at 151; "a man", *id.* at 155; "people", *id.* at 156; "a man", *id.* at 160; "the poor and the weak in our society, individuals without friends in high places", and "a man", *id.* at 163). See also *Barton* v. *Maryland, supra.* (Opinion of Mr. Justice Marshall).

The notion that corporations have standing to invoke the double jeopardy clause appears to be unsupported by any authority other than some off-hand comments by a California district court. (*U. S.* v. *Arnco Steel Corp.*, 252 F. Supp. 364, 368 (D. C. Cal. 1966)). Subsequently however, this Court held in *Campbell Painting Corp.* v. *Reid,* 392 U. S. 286 (1968) that the Fifth Amendment privilege against self-incrimination applies only to natural individuals. *Id.* 392 U. S. at 288, 20 L. Ed. 2d at 1097. Unlike the self-incrimination clause nothing in the double

jeopardy clause has any pertinence to non-natural persons. Clearly its protection is not available to a corporation. For this reason in addition to others, respondent respectfully submits that the petitions of Colonial and Bechtel must be denied.

POINT III

Trial of petitioners on counts similar to counts upon which they were convicted under an invalid federal indictment later set aside is consistent with the applicable federal standard of double jeopardy.

It is well established in federal law that a defendant can claim no former jeopardy after a judgment for conviction upon an invalid indictment has been set aside as a result of defendant's challenge to the indictment. *Ewell* v. *United States, supra,* 383 U. S. at 124; *Ball* v. *United States,* 163 U. S. 662, 672, 16 S. Ct. 1192, 1195 (1896). The doctrine of "continuing jeopardy", (e.g. *Price* v. *Georgia,* 398 U. S. 322 (1970); *Green* v. *United States,* 355 U. S. 184, 189 (1957), is inapposite where defendant has procured a reversal of conviction on the basis of the invalidity of the indictment (e.g., *Ewell, supra, Ball, supra,*) rather than on the basis of trial errors (e.g., *Price, supra, Green, supra*).

The foregoing conclusion is inescapable, in view of the illumination of the conceptual basis of *Ewell* provided by recent circuit decisions. In *United States* v. *Beard,* 414 F. 2d 1014 (3d Cir. 1969) the court found that a count in an indictment which failed to allege unlawful or fraudulent intent was a nullity. Based upon this determination the court citing in support *Ball, supra,* and *Ewell,*

supra, stated that: "The United States will be free to reindict and retry these defendants according to law." *Id.* 414 F. 2d at 1017. *United States* v. *Franke,* 409 F. 2d 958 (7 Cir. 1969) is to similar effect.

If, for purposes of the constitutional guarantee, no former jeopardy attached from trial and conviction on various counts of the invalid federal indictments, now quashed, *a fortiori,* prosecution under these counts cannot bar prosecution by the State under an indictment which includes similar counts. The holding of *Benton* v. *Maryland,* 395 U. S. 784 (1969), that the state and federal standards of double jeopardy are the same dictates this conclusion. Moreover, the thrust of petitioner's assault upon the dual sovereignty doctrine is that the federal and state governments should be regarded as one for purposes of the second trial. A contention that the State, after a defendants conviction and subsequent reversal of conviction under circumstances not amounting to former federal jeopardy, is barred from trying the defendant is therefore incompatible with this notion since the former must rest of course on the maintenance of formal distinctions between the prosecutorial agencies.

For the foregoing reasons, in addition to those stated in prior sections, it is respectfully submitted that respondent's ability to retry, if not punish, on every count, each of the petitioners is not dependent upon the dual sovereignty doctrine and is fully consistent with pertinent federal principles of double jeopardy.

POINT IV

Recent decisions of this Court have not undermined the dual sovereignty concept embodied in *Bartkus* v. *Illinois*.

Contrary to the view expressed by petitioners, *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964), in no respect represents a repudiation of the dual sovereignty concept articulated by the court a few years before *Bartkus*. Indeed, the configuration of the rule which emerged from *Murphy* was the direct result of the Court's punctilious recognition of the need to accomodate law enforcement interests of both the state and the federal sovereigns within its constitutional framework. *Id.* 378 U. S., at 79. More recently, in *Waller* v. *Florida*, 397 U. S. 387 (1970) the gravamen of the Court's decision was its determination that unlike the relationship between the states and the federal government, i.e., as separate sovereigns, a city is merely a subdivision of the state sovereign and cannot assert the prerogatives of separate sovereignty.

But even were *Bartkus* to lose some of its force, Mr. Justice Frankfurter's discussion of the effect of a bar on the states in bringing a second prosecution related to the federal prosecution would continue to be pertinent to the instant case. Mr. Justice Frankfurter pointed out that even in such a situation there must remain, for the trial court the knotty task ". . . of determining when the federal and state statutes are so much alike that a prosecution under the former bars a prosecution under the latter . . ." *Bartkus, supra*, 359 U. S. at 137.

Mr. Justice Frankfurter continued:

> "The proper solution of that problem frequently depends upon the gravamen of the state statute.

> It depends also upon an understanding of the scope of the bar that has been historically granted in the state to prevent successive state prosecutions. *Both of these problems are ones which the states are obviously more competent to handle than is this court.*" *Ibid.* (emphasis supplied).

Likewise, respondent respectfully submits that this Court should not undertake such determination until the courts of New Jersey have had an adequate opportunity to make this judgment on a full record. Clearly at this juncture in the proceedings they have not had that opportunity.

CONCLUSION

For all of the foregoing reasons, respondent, State of New Jersey respectfully prays that the writs of certiorari sought in the above-named petitions pending before this Court not issue.

Respectfully submitted,

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